

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 09-04668 CW

V.L., et al.,

Plaintiffs,

v.

JOHN A. WAGNER, Director of the  
California Department of Social  
Services; DAVID MAXWELL-JOLLY,  
Director of the California Department  
of Health Care Services; CALIFORNIA  
DEPARTMENT OF HEALTH CARE SERVICES;  
CALIFORNIA DEPARTMENT OF SOCIAL  
SERVICES,

Defendants.

ORDER GRANTING IN  
PART PLAINTIFFS'  
MOTION FOR CIVIL  
CONTEMPT SANCTIONS  
AND ENFORCING  
INJUNCTION

On October 19, 2009, the Court enjoined and restrained Defendants "from implementing the provisions of ABX4 4 that amended Sections 12309(e) and 12309.2 of the California Welfare and Institutions Code to terminate from eligibility for [In-Home Supportive Services] those recipients with Functional Index (FI) Scores of less than 2.0 and to eliminate domestic and related services for recipients with functional ranks of less than 4 for those services." On October 23, 2009, the Court explained the reasons for the injunction and delineated the terms of the injunction in more detail. In this motion, Plaintiffs assert that Defendants violated the injunction by: (1) terminating or reducing services for almost 3,000 individuals with FI Scores under 2.0 or

1 functional ranks under 4; (2) failing to take all steps and commit  
2 all resources necessary to ensure that none of these otherwise  
3 eligible individuals would be denied eligibility for, or terminated  
4 from, receipt of IHSS services or domestic and related IHSS  
5 services; (3) failing to notify providers who were incorrectly  
6 notified that their recipients' IHSS hours had been terminated or  
7 reduced that they should continue to work previously-authorized  
8 hours; and (4) failing to serve and file a declaration of  
9 compliance demonstrating actual compliance with the Court's  
10 Preliminary Injunction by Thursday, October 29, 2009. Defendants  
11 assert that they "are, and at all times have been, in compliance  
12 with the preliminary injunction." Opposition at 1. The motion was  
13 heard on November 19, 2009. Having considered oral argument and  
14 all of the papers filed by the parties, the Court finds clear and  
15 convincing evidence that Defendants are in violation of its orders.  
16 The Court enters further orders and coercive sanctions to remedy  
17 the non-compliance and compel prospective compliance.

#### 18 BACKGROUND

19 The Court issued its initial injunction, quoted above, on  
20 October 19, 2009. Thereafter, in the course of briefing the  
21 details of the further injunction that would issue, Plaintiffs  
22 warned that, unless corrective measures were taken, time-cards  
23 would be sent between November 6 and 10, 2009 that would  
24 incorrectly inform providers that their clients' eligibility for  
25 services would be terminated or reduced. This would lead the  
26 providers to fail to perform needed services for recipients. For  
27 instance, on October 20, 2009, a declaration submitted by  
28 Plaintiffs stated,

1 Although the IHSS terminations and reductions are scheduled  
2 to go into effect on November 1, 2009, the provider  
3 timesheets that show consumers' post-November 1 authorized  
4 hours will not be sent until sometime around November 6-10,  
2009. So long as the changes are made before then,  
consumers' IHSS services should continue uninterrupted, and  
confusion among providers should be avoided.

5 Nicco Decl. in Support of Plaintiffs' Additional Response Re:  
6 Implementation Issues at ¶ 5. Further, on October 22, Plaintiffs  
7 noted:

8 There appears to be a very real chance here that some  
9 providers will receive erroneous timesheets or paychecks,  
and, believing that they have been fired or had hours  
10 reduced by operation of state law, fail to provide necessary  
IHSS services to a recipient. The only way to mitigate the  
11 potential for errors is to send notices directly to  
providers, so that they keep working and rendering IHSS  
12 services even if Defendants send them an erroneous timesheet  
or paycheck.

13 Plaintiffs' Supplemental Response Re: Implementation Issues at 1.  
14 Despite these warnings, Defendants resisted sending notices to  
15 providers. The Court did not order the notices, relying on  
16 Defendants to obey its order not to terminate the recipients'  
17 services.

18 On October 23, 2009, the Court further detailed the terms of  
19 the injunction as follows:

20 . . . to the extent that Defendants have already taken  
21 actions to eliminate eligibility for IHSS services for  
individuals with an FI Score under 2, or to eliminate  
22 eligibility for domestic and related services for  
individuals with functional ranks under 4, Defendants  
23 shall take all steps and commit all resources necessary to  
ensure that no otherwise eligible individual is denied  
24 eligibility for, or terminated from, IHSS, solely on the  
basis of an FI Score under 2.0, and that no otherwise  
25 eligible individual is denied eligibility for, or  
terminated from, receipt of domestic and related IHSS  
26 services, solely on the basis of a functional rank under  
4. Defendants shall further ensure that there is no delay  
27 in paying IHSS providers for services rendered to  
individuals whom Defendants had planned to terminate or  
28 reduce IHSS eligibility on the basis of an FI score under  
2.0 or a functional rank under 4. Defendants shall

1 determine the method of implementing the preliminary  
2 injunction that will be the least expensive in the  
3 aggregate to the county and state taxpayers. Defendants  
4 may require the counties to re-enter manually the  
5 information about individual recipients whose IHSS  
6 services were scheduled to be terminated or reduced  
7 because their FI Scores were below 2.0 or their functional  
8 ranks for a particular domestic or related service were  
9 below 4 only if that is less expensive than doing it  
10 themselves. The State must reimburse the counties for  
11 their expenses. The State may instead restore the system  
12 back-up and re-enter the changes made in the interim.

7 To ensure that all relevant parties are aware of the  
8 Court's injunction, Defendants shall further rescind any  
9 directions or notices issued to any person or entity for  
10 the termination or reduction of IHSS benefits on the basis  
11 of an FI Score under 2 or functional ranks under 4; and  
12 shall notify all persons and entities that have received  
13 such directions or notices that such IHSS benefits will  
14 not be terminated or reduced. Defendants shall mail a  
15 notice to all IHSS recipients informing them, in language  
16 agreed upon by the parties, that the previously announced  
17 terminations or reductions in IHSS service will not go  
18 into effect. Defendants must mail this notice by Tuesday,  
19 October 27.

14 Defendants shall post a copy of this preliminary  
15 injunction with an explanation of its effect on IHSS  
16 services conspicuously on its website by the close of  
17 business on Monday, October 26, 2009. Defendants shall  
18 serve and file a declaration of compliance by Thursday,  
19 October 29, 2009.

17 After the injunction issued, Plaintiffs contacted Defendants  
18 to discuss the timely implementation of the Court's order. On  
19 October 26, Plaintiffs asked Defendants' counsel how Defendants  
20 planned to track counties' work to make sure it was completed  
21 before new and possibly incorrect time cards were issued to  
22 providers. Cervantez Decl. ¶ 3. Defendants responded by assuring  
23 Plaintiffs that the records would be updated by November 1 or soon  
24 thereafter, and that there would be no disruption in services. Id.  
25 at ¶ 5. On October 29, Plaintiffs sent an email to Defendants  
26 following up on these issues:

27 A concern has been raised that, if data entry is not  
28 completed in time, or there are errors in the data entry,  
providers may receive incorrect timesheets with their

1 paycheck for the October 16-31 pay period. Please verify  
2 when the first of these time sheets will be sent out, and  
3 let us know what your clients' plans are for dealing with  
4 providers who receive incorrect time sheet (i.e. listing  
5 zero hours or reduced hours for the period November 1-  
15). If these time sheets are not corrected, some  
6 providers may incorrectly believe they have been  
7 terminated or had authorized hours reduced, and not work  
8 the full complement of hours needed by the consumers.

9 Id., Exh. A.

10 The same day, Defendants filed a "Certificate of Compliance"  
11 that stated: (1) on October 22, Defendants ordered the counties to  
12 reenter manually the information about individual recipients whose  
13 IHSS services were scheduled to be terminated or reduced; (2) as of  
14 noon on October 28, the counties had restored 67,738 records,  
15 leaving 50,048 files still to be restored; (3) "Defendants have  
16 asked the counties to take all steps necessary to ensure that all  
17 117,786 Impacted Recipients' files will be updated before November  
18 1, 2009, and the counties appear to be on pace to do so . . .  
19 Defendants have determined that having the counties enter this  
20 information is the only option available to make all of the  
21 necessary changes before November 1, 2009 (or as soon thereafter as  
22 possible in the event that the counties cannot complete the changes  
23 before that date)"; and (4) "Defendants will file a supplemental  
24 certification of compliance after all Impacted Recipients' files  
25 have been updated."

26 On October 30, Defendants responded Plaintiffs' October 29  
27 email by noting that they did not know of any problems with  
28 implementing the injunction, but they did not address the specific  
29 concerns raised in the email about provider time-cards. Plaintiffs  
30 sent similar emails to Defendants on November 2, 3, 4 and 6.  
31 Defendants responded to these emails by reporting the updated

1 number of IHSS recipients restored, but they failed to address the  
2 time-card issue.

3       Nonetheless, and despite the warnings and pleas from  
4 Plaintiffs' counsel, between November 6 and 10, Defendants  
5 proceeded to mail out the incorrect time-cards to the 6,000  
6 providers of service<sup>1</sup> to almost 3,000 IHSS recipients, as  
7 Plaintiffs predicted they would. These inaccurate time-cards list  
8 the hours the providers are authorized to work for the period from  
9 November 1 to 15. Because the records for these recipients have  
10 not been restored, these providers' time-cards show zero hours if  
11 the providers' recipients were slated for termination, or show a  
12 reduced number of authorized hours for domestic or related  
13 services.

14       For instance, on November 6, 2009, along with a time-card,  
15 Defendants issued a direct deposit notice to one such provider for  
16 her services between October 16 and October 31, which stated  
17 "RECORDS INDICATE THAT YOUR ELIGIBILITY ENDED 10/31/2009." Julie  
18 Belzman Decl., Exh. A (upper case in original). This meant that,  
19 after October 31, this provider would believe that she was not  
20 eligible to be paid for her services to her assigned IHSS  
21 recipient.

22       As of November 9, the date Plaintiffs filed this motion,  
23 Defendants reported that (1) the counties had not updated the files  
24 for 2,829 IHSS recipients, (2) they had not identified which  
25 counties had not updated all of their files and (3) they

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26  
27       <sup>1</sup>At a hearing on November 20, 2009, Defendants represented  
28 that over 6,000 providers supply services for these approximately  
3,000 recipients. Many recipients have more than one provider.

1 anticipated that most files would be updated by November 15, but  
2 did not have a specific estimated date for completion. Bird Decl.  
3 ¶ 4.

4 Defendants have not since notified the 6,000 providers for  
5 these 3,000 IHSS recipients that their time-cards erroneously state  
6 that the recipients are eligible for no services, or for reduced  
7 services. Plaintiffs fear that, as a result, providers will likely  
8 cease or reduce services to those recipients. Plaintiffs also  
9 assert that providers will likely receive incorrect paychecks, in  
10 violation of the injunction, if recipients' files are not updated  
11 by the time that paychecks are issued or if providers fail to claim  
12 the hours that they actually worked but believe were not authorized  
13 to work.

14 On November 19, 2009, the day of the hearing on this motion,  
15 Defendants filed a supplemental certificate of compliance, which  
16 stated that, as of that day, the counties had completed the updates  
17 to the files of 116,901 of the 117,828 impacted IHSS recipients,  
18 leaving 927 files left to be updated.

19 LEGAL STANDARD

20 A district court has the inherent authority to enforce  
21 compliance with its orders through a civil contempt proceeding.  
22 International Union, UMWA v. Bagwell, 512 U.S. 821, 827-28 (1994).  
23 A contempt sanction is considered civil if it "is remedial, and for  
24 the benefit of the complainant." Id. A contempt fine is  
25 considered civil and remedial if it either "coerce[s] the defendant  
26 into compliance with the court's order, [or] . . . compensate[s]  
27 the complainant for losses sustained." United States v. United  
28 Mine Workers, 330 U.S. 258, 303-304 (1947).

1 If a person disobeys a specific and definite court order, he  
2 or she may properly be held in contempt. In re Crystal Palace  
3 Gambling Hall, Inc., 817 F.2d 1361, 1365 (9th Cir. 1987). A party  
4 disobeys a court order when it "fails to take all the reasonable  
5 steps within [its] power to insure compliance with the [court's]  
6 order." Id. (citation omitted).

7 In deciding whether to impose a civil contempt sanction, a  
8 district court should consider the following factors: the harm  
9 from non-compliance; the probable effectiveness of the sanction;  
10 the contemnor's financial resources and the burden the sanctions  
11 may impose; and the contemnor's willfulness in disregarding the  
12 court's order. United Mine Workers, 330 U.S. at 303-304.

13 The moving party must demonstrate by clear and convincing  
14 evidence that the contemnor violated the court's order. In Re  
15 Dual-Deck Video Cassette Recorder Antitrust Litig., 10 F.3d 693,  
16 695 (9th Cir. 1993) (citing Vertex Distrib., Inc. v. Falcon Foam  
17 Plastics, Inc., 689 F.2d 885, 889 (9th Cir. 1982)); Balla v. Idaho  
18 State Bd. of Corrections, 869 F.2d 461, 466 (9th Cir. 1989). The  
19 burden then shifts to the respondents to demonstrate that they have  
20 performed "'all reasonable steps within their power to insure  
21 compliance' with the court's orders." Stone v. City and County of  
22 San Francisco, 968 F.2d 850, 856 (9th Cir. 1992), cert. denied, 506  
23 U.S. 1081 (1993) (quoting Sekaquaptewa v. MacDonald, 544 F.2d 396,  
24 404 (9th Cir. 1976)). A party may escape contempt by demonstrating  
25 that he or she is unable to comply with the court's order. In re  
26 Crystal Palace, 817 F.2d at 1365. In order to prevail on this  
27 defense, the alleged contemnor must submit evidence to support it.  
28 Combs v. Ryan's Coal Co., Inc., 785 F.2d 970, 984 (11th Cir. 1986)



1 (contemnor's financial statements were inadequate because they were  
2 incomplete, unverified, not based on independent audits, and not  
3 accompanied by current tax returns).

4 DISCUSSION

5 Defendants argue that they are not in violation of the  
6 injunction because the Court did "not set any specific deadline at  
7 all" for the restoration of IHSS recipients' records. Opp. At 6.  
8 The Court ordered Defendants to file a certificate of compliance on  
9 October 29, 2009. Furthermore, the Court ordered Defendants to  
10 "take all steps and commit all resources necessary to ensure that  
11 no otherwise eligible individual is denied eligibility for or  
12 terminated from IHSS on the basis of FI Score or functional rank,"  
13 and to "ensure that there is no delay in paying IHSS providers for  
14 services rendered to individuals" who would have been affected by  
15 ABX4 4. Oct. 23 Preliminary Injunction at 30.

16 Defendants have failed to ensure that no IHSS recipients were  
17 denied eligibility for services based on their functional ranks or  
18 FI Scores. As of November 9, 2009, almost 3,000 recipients were  
19 recorded as ineligible for some or all services.

20 In a number of instances, the counties' records showed that  
21 they had completed the process of restoring eligibility in the  
22 recipients' files, but the State's data told Defendants otherwise.  
23 For instance, Defendants note that they "received a live update  
24 from Riverside County on November 10th that they had completed all  
25 of their data entry." Romero Decl. ¶ 4. However, as of November  
26 12, the State's records reflected that Riverside County had not  
27 restored the records for forty-four terminated recipients and  
28 sixty-two recipients scheduled to lose domestic and related

1 services. Id., Exh. C. Despite this discrepancy, Defendants  
2 failed to contact the county and address the issue.

3 Similarly, in San Francisco, the county believed it had  
4 restored the records of all of its IHSS recipients by October 30.  
5 Nicco Decl. ¶¶ 2, 6-7. Yet, the State's records on November 12  
6 showed that San Francisco had failed to restore data for 118  
7 recipients. Romero Decl., Exh. C. No State official notified San  
8 Francisco of this discrepancy, which it learned of from Plaintiffs'  
9 counsel.

10 There may be other counties that are similarly misled into  
11 believing that the files of all of their IHSS recipients have been  
12 updated. Such discrepancies in the data have serious consequences  
13 for IHSS recipients. Until their records are properly updated,  
14 these elderly and disabled individuals will appear to be ineligible  
15 for IHSS services. Because Defendants are not taking adequate  
16 steps to comply, the Court must intervene to ensure that IHSS  
17 services for these recipients will not be terminated in violation  
18 of the Court's injunction.

19 Further, Defendants were specifically and repeatedly warned,  
20 and thus they knew that, unless they took some affirmative action,  
21 incorrect time-cards would be issued, erroneously telling providers  
22 that their hours for November 1 through 15 would be reduced or  
23 eliminated. Nonetheless, Defendants failed to take the "necessary"  
24 steps to "ensure" that these erroneous time-cards would not be  
25 mailed.

26 The only way providers know how many hours they are authorized  
27 to work for a particular IHSS recipient during a given time period  
28 is by checking how many hours are listed on the time-card that the

1 State sends. Providers "pay close attention to the authorized  
2 hours shown on the time-cards they receive from the State" and are  
3 likely to believe that only the hours listed on those cards are  
4 authorized and to work only those hours. McDevitt Dec. ¶¶ 3-9, 13.

5 Defendants claim that a provider "confused by an incorrect  
6 time card could clear up any confusion simply by speaking with  
7 his/her recipient employer, by contacting the county, or by  
8 contacting the provider union." Opp. At 8. However, many IHSS  
9 recipients are frail and disoriented elders or individuals with  
10 cognitive or mental impairments who may not be able to communicate  
11 effectively with their providers. Further, providers will be  
12 receiving these time-cards after recipients have received notice of  
13 the Court's injunction. Thus, providers and recipients will likely  
14 be confused into thinking that the hours have been eliminated or  
15 reduced for some reason other than ABX4 4. McDevitt Dec. ¶¶ 14,  
16 17-18. Moreover, there is no assurance that counties or the unions  
17 will be able to address these concerns adequately.

18 Defendants have also failed to obey the Court's order that  
19 they "rescind any directions or notices issued to any person or  
20 entity for the termination or reduction of IHSS benefits on the  
21 basis of an FI Score under 2 or functional ranks under 4; and shall  
22 notify all persons and entities that have received such directions  
23 or notices that such IHSS benefits will not be terminated or  
24 reduced." Oct. 23 Preliminary Injunction at 30-31. As noted  
25 above, Defendants sent incorrect time-cards declaring reduced or  
26 eliminated authorized hours to over 6,000 IHSS providers for almost  
27 3,000 recipients. These time-cards constituted "notices issued to  
28 any person or entity" for the termination or reduction of IHSS

1 benefits as described in the Court's injunction. The injunction  
2 required that Defendants rescind any such notices and notify such  
3 persons and entities that "such IHSS benefits will not be  
4 terminated or reduced." Defendants did not do so. Thus,  
5 Defendants violated the notice provision of the injunction by  
6 failing to rescind and send out notices correcting their  
7 contumacious mailing of these incorrect time-cards.

8 For these reasons, the Court finds clear and convincing  
9 evidence that Defendants are in contempt of Court for violating its  
10 preliminary injunctions issued on October 19 and 23. However, the  
11 Court declines to adopt Plaintiffs' recommendation to sanction  
12 Defendants \$250,000 for every day that they continue to be in  
13 violation of the injunction. Although Defendants' actions are  
14 reprehensible, in consideration of the current budget crisis,  
15 fining the State in this manner and at this time is not warranted.

16 At the November 19 hearing, the Court ordered the following to  
17 enforce its injunction and to remedy Defendants' contempt of Court:

18 (1) By November 20, Defendants shall have sent to Plaintiffs  
19 and the appropriate counties the names and any other identifying  
20 information of all recipients whose records have not yet been  
21 restored, instructed counties to ensure that all such recipients  
22 have had their records restored, and instructed counties that any  
23 time-card submitted that generates an error message because either  
24 no hours or fewer hours are authorized than those claimed by the  
25 provider must be double-checked against the list of recipients and  
26 providers affected by the Court's injunction, and data corrected in  
27 the files as necessary.

28 (2) By November 20, Defendants shall have begun calling each

1 county to confer in real time about their progress in updating the  
2 files;

3 (3) By November 20, Defendants shall have provided Plaintiffs'  
4 counsel with immediate discovery of the names and contact  
5 information of all 3,000 recipients whose records had not been  
6 restored by November 5, 2009 and the names and contact information  
7 of their 6,000 providers who will receive misleading time-cards.<sup>2</sup>

8 These are members of the class that Plaintiffs and their attorneys  
9 seek to represent. This information may be used only by

10 (1) Plaintiffs' counsel to respond to inquiries from IHSS  
11 recipients in order to assure them that their IHSS services have  
12 not been eliminated or reduced and (2) Plaintiff unions to contact  
13 union-member IHSS providers and field inquiries from any providers  
14 to assure them that their authorized hours to provide IHSS services  
15 have not been eliminated or reduced.

16 (4) By November 23, at the State's expense, Plaintiffs'  
17 counsel shall have sent all 6,000 providers who received incorrect  
18 time-cards a supplemental time-card and a notice, informing  
19 providers that these time-cards were erroneous, that providers  
20 should continue to work and will be paid for the previously  
21 authorized hours, that providers should submit a supplemental time-  
22 card for any hours worked but not recorded on a previously  
23 submitted time card or worked in a later pay period to make up for  
24 hours not worked due to the incorrect time cards, and how providers  
25 can request a supplemental paycheck. These notices shall contain

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26  
27 <sup>2</sup>On November 20, 23 and 24, Defendants admitted that they had  
28 not provided this discovery and asked the Court to reconsider and  
to stay its order. The Court orally denied the motions for  
reconsideration and to stay.

1 substantially the same language as that set forth in the Appendix  
2 to the proposed order submitted by Plaintiffs attached to their  
3 reply brief. The notices shall be in English, Spanish, Chinese,  
4 Hmong, Armenian, Russian and Vietnamese. The Court authorized  
5 Plaintiffs' counsel to arrange for the mailing of this notice  
6 because Defendants professed to be unable to do so in less than a  
7 week's time, which would have delayed notification past the  
8 Thanksgiving holiday. On November 25, Defendants shall send a copy  
9 of this notice and a copy of a blank supplemental time-card to all  
10 counties along with an agreed-upon explanation of the procedures  
11 they must follow.

12 (5) By November 23, Defendants shall have established a toll-  
13 free telephone number staffed by State employees to answer  
14 questions or concerns about recipients' and providers' eligibility;

15 The Court further orders Defendants to:

16 (1) Update manually by November 25, 2009 any files that have  
17 still not been updated.

18 (2) Issue supplemental checks within four business days to any  
19 providers who were not paid for authorized hours that they worked  
20 in November, 2009, because of the erroneous time-cards they  
21 received or the State's failure to restore the eligibility of  
22 recipients for whom they provide services;

23 (3) Pay all reasonable attorneys' fees and costs incurred by  
24 Plaintiffs in bringing the instant motion for contempt, including  
25 the costs of the mailing ordered above. Within thirty days of this  
26 order, Plaintiffs' counsel shall submit an application to the Court  
27 documenting their reasonable attorneys' fees and costs incurred in  
28 connection with this motion, and a proposed order.

1 (4) Appear in Court or by telephone daily as the Court  
2 requires to make reports as to the status of their compliance with  
3 the Court's October 19 and 23 injunctions and the instant Order,  
4 until they are in full compliance with the terms of the injunction  
5 and have submitted a supplemental certificate of compliance so  
6 verifying.

7 IT IS SO ORDERED.

8 Dated: 11/25/09



CLAUDIA WILKEN  
United States District Judge